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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 ALVIN L. BRAGG, JR., in his  
4 official capacity as District  
Attorney for New York County,

5 Plaintiff,

6 v.

23 Civ. 3032 (MKV)

7 JIM JORDAN, in his official  
8 capacity as Chairman of the  
Committee on the Judiciary;  
9 COMMITTEE ON THE JUDICIARY OF  
THE UNITED STATES HOUSE OF  
10 REPRESENTATIVES; and MARK F.  
POMERANTZ,

11 Defendants.

Oral Argument

12 -----x  
13 New York, N.Y.  
April 19, 2023  
14 2:00 p.m.

Before:

15 HON. MARY KAY VYSKOCIL,

16  
17 District Judge  
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APPEARANCES

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Attorneys for Plaintiff  
BY: THEODORE J. BOUTROUS, JR.  
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-and-  
LESLIE B. DUBECK  
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Attorneys for Defendants  
Jordan and Committee on the Judiciary  
Office of General Counsel,  
U.S. House of Representatives

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP  
Attorneys for Defendant Pomerantz  
BY: THEODORE V. WELLS, JR.  
JAKE G. ROSEN

Also Present: Steve Castor

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(Case called; appearances noted)

THE COURT: Good afternoon.

All right. We're here for argument on plaintiff Alvin Bragg's application for an injunction with respect to the subpoena issued by the House Judiciary Committee.

Will I be hearing from you first, Mr. Boutrous?

MR. BOUTROUS: Yes, your Honor. Thank you.

THE COURT: All right. Thank you.

And by the way, I'm just going to remind people that I am going to strictly enforce the time limits that we talked to the parties about in advance. Ms. Dempsey is going to keep track of the time. Obviously there are some time sensitivities here, and we need to be efficient with the use of time, so please bear that in mind.

MR. BOUTROUS: Thank you very much, your Honor.

THE COURT: Thank you.

MR. BOUTROUS: Thank you. And may it please the Court, your Honor?

This Court should grant a temporary restraining order and injunction precluding enforcement of this subpoena, which raises serious federalism issues, separation of powers issues, and would cause irreparable harm to the district attorney and the state of New York if it is allowed to go forward. We also believe that the public interest and the equities strongly favor this relief.

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1           THE COURT: All right. Let me ask you at the outset,  
2 Mr. Boutrous -- I know I received letters from two sets of  
3 amici; everybody keeps throwing around separation of powers --  
4 aren't we really talking before federalism, not separation of  
5 powers here?

6           MR. BOUTROUS: Your Honor, it's a really interesting  
7 point because, here, I think separation of powers comes into  
8 play in two senses. Courts have, the D.C. Circuit and others,  
9 talked about federalism raising what's a form of vertical  
10 separation of powers. It's a separation of the powers of  
11 federal and state governments.

12          THE COURT: Courts have said that or --

13          MR. BOUTROUS: Yes.

14          THE COURT: -- academics?

15          MR. BOUTROUS: The D.C. Circuit has said it, and we  
16 cited a D.C. Circuit case on this point, your Honor.

17          And then in terms of separation of powers, we have  
18 Congress seeking to superintend the executive branch of New  
19 York, the D.A. Bragg, and the judicial proceedings pending  
20 before Judge Merchan.

21          THE COURT: How? How does the subpoena in any way  
22 supersede the proceeding in the criminal case that's been  
23 brought by the D.A.?

24          MR. BOUTROUS: It doesn't supersede it, your Honor; it  
25 superintends. It oversees that proceeding. That has been

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1 the --

2 THE COURT: Hold on a second.

3 MR. BOUTROUS: Yes.

4 THE COURT: I'm sorry. Go ahead.

5 MR. BOUTROUS: Thank you, your Honor.

6 Chairman Jordan has been very clear. In his letter to  
7 Mr. Pomerantz, he said nine times that the subpoena's purpose  
8 was to conduct oversight over Attorney Bragg.

9 THE COURT: He's talking generically about Congress  
10 having oversight responsibility, and then he lays out three, as  
11 I read the letter, different legislative purposes for the  
12 subpoena.

13 MR. BOUTROUS: Only after the fact, your Honor.  
14 First, he doesn't talk about general oversight. He says that  
15 they want to investigate whether attorney general Bragg,  
16 District Attorney Bragg is proceeding with political  
17 motivation.

18 THE COURT: He wants to investigate whether federal  
19 funds are being used. Why is that not a legitimate legislative  
20 purpose for the subpoena?

21 MR. BOUTROUS: That one, your Honor, we gave them, the  
22 District Attorney's Office gave information to Chairman Jordan,  
23 offered to meet and confer, offered to provide additional  
24 information. Mr. Pomerantz's declaration says he has no  
25 knowledge whatsoever of federal funds.

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1 THE COURT: If he has no knowledge, it'll be a short  
2 deposition.

3 MR. BOUTROUS: **Well, it would be, your Honor, perhaps**  
4 **if you were supervising it. But Chairman Jordan will be, and**  
5 **he rules on objections. He's already said that he believes**  
6 **there's been a waiver of all privileges that Mr. Pomerantz may**  
7 **have possessed as a member of the District Attorney's Office.**

8 THE COURT: Tell me, Mr. Boutrous, how does this book,  
9 which is chock-full of what Mr. Pomerantz calls insider  
10 account, how does it not disclose mental impressions,  
11 deliberations of the office, the internal workings of the  
12 D.A.'s office? How is there not a waiver?

13 MR. BOUTROUS: Your Honor, the District Attorney's  
14 Office did not waive anything -- in fact, objected and asked  
15 for pre-publication review.

16 THE COURT: And he said no, right?

17 MR. BOUTROUS: He said no.

18 THE COURT: And what steps did the D.A.'s office take  
19 to preserve its privilege?

20 MR. BOUTROUS: I'll let Ms. Dubeck give the Court some  
21 information.

22 THE COURT: OK. We can defer that if you want.

23 MR. BOUTROUS: Yes.

24 THE COURT: I don't want to interrupt.

25 MR. BOUTROUS: I'll let Ms. Dubeck address it, because

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1 a number of significant steps were taken.

2 But your Honor, here, in *Mazars*, the Supreme Court  
3 said that the court did not have to blind itself to what  
4 everyone can see. Chairman Jordan, Chairman Comer of another  
5 committee, the speaker of the house have all made clear that  
6 this subpoena is part of a targeted effort to intrude on the  
7 sovereignty of New York, to intimidate District Attorney Bragg.

8 THE COURT: That's your interpretation of it. I'm  
9 quite certain Congress never used those terms -- quite certain.

10 MR. BOUTROUS: Well, they didn't use "intimidate,"  
11 your Honor.

12 THE COURT: Correct.

13 MR. BOUTROUS: But the speaker of the house said we  
14 are going to hold the district attorney to account and hold him  
15 accountable. The speaker of the house unleashed investigations  
16 specifically regarding the district attorney. It's never been  
17 clear -- and I hear your Honor. We don't have to read their  
18 minds. They've been very, very explicit.

19 THE COURT: In fact, doesn't the case law all say that  
20 I shouldn't try to read the minds of either side here?

21 MR. BOUTROUS: Exactly, your Honor.

22 THE COURT: If there's a valid legislative purpose,  
23 that's the end of the inquiry, right?

24 MR. BOUTROUS: No, your Honor. Here -- well, first  
25 let me address that.

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1 THE COURT: Yes.

2 MR. BOUTROUS: On the reading of the minds, the Court  
3 does not have to do that here. I don't think there's probably  
4 been in history a more explicit, repeated expression of  
5 improper legislative purposes. For them to supervise, to  
6 interrogate -- as you know, your Honor, they sought information  
7 from the district attorney himself, wanted to take his  
8 deposition. They haven't given that up.

9 THE COURT: That's not what we're here on today.

10 MR. BOUTROUS: I totally understand, your Honor.

11 THE COURT: Right?

12 MR. BOUTROUS: But this is an ongoing criminal  
13 prosecution, and they want information about it, about the  
14 investigations.

15 Yes. Let me go back to the book, your Honor.

16 THE COURT: It's hard to avoid it.

17 MR. BOUTROUS: I know.

18 THE COURT: Isn't it, Mr. Boutrous?

19 MR. BOUTROUS: I knew you were going to ask me about  
20 it.

21 THE COURT: Well?

22 MR. BOUTROUS: And let me explain.

23 First of all, they've got the book. So why do they  
24 need Mr. Pomerantz?

25 THE COURT: Look, you're a very experienced litigator,

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1 Mr. Boutrous. You know full well that just because someone has  
2 some information doesn't mean that they're not allowed to  
3 inquire further in the manner in which they wish to inquire.  
4 And in fact, with respect to congressional subpoenas, that's  
5 what the cases say. It's not for the courts to tell Congress,  
6 if it's about a subpoena, how to conduct an inquiry.

7 MR. BOUTROUS: Two things, your Honor.

8 First, the Supreme Court's *Mazars* decision really  
9 changed the landscape. It didn't get as much play when it came  
10 out in terms of its significance. It does say that the courts  
11 can tell Congress the scope of their subpoena.

12 THE COURT: Justice Roberts, at the very beginning of  
13 his opinion in *Mazars*, talks about the fact that that subpoena  
14 in that case set up a clash between Congress and the President,  
15 two political branches. We are talking separation of powers  
16 there, and he says, "that distinctive aspect necessarily  
17 informs our analysis of the question before us."

18 MR. BOUTROUS: Yes, your Honor.

19 THE COURT: Which is not what we have here.

20 MR. BOUTROUS: I think we have at least as weighty  
21 concerns. The federalism concerns, you have the federal  
22 Congress jumping in and haranguing the district attorney when  
23 the prosecution is ongoing, and that is a blatant federalism  
24 violation. The other separation of powers, your Honor --

25 THE COURT: That's a different issue, though, of

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1 whether the subpoena has a valid legislative purpose and  
2 whether I have any power to interfere with a congressional  
3 investigation. There's politics going on on both sides here.  
4 Let's be honest about that.

5 MR. BOUTROUS: I don't concede that there's politics  
6 going on on the district attorney's side, your Honor, but let  
7 me address --

8 THE COURT: Mr. Boutrous, what did half of the  
9 pictures and allegations in your complaint have to do with the  
10 subpoena?

11 MR. BOUTROUS: Well, they were --

12 THE COURT: That's rhetorical.

13 MR. BOUTROUS: Yes. I mean it was President Trump and  
14 the chairman.

15 THE COURT: Yes, which had nothing to do with the  
16 subpoena before me or the issue I need to decide.

17 MR. BOUTROUS: Let's put those aside, because you  
18 asked about the separation of powers.

19 THE COURT: Yes.

20 MR. BOUTROUS: The *Kilbourn* case that we cited was a  
21 subpoena from Congress. It was filed against members -- the  
22 action was filed, and the Supreme Court held that because,  
23 there, the subpoena was regarding a pending bankruptcy  
24 proceeding, that it was a judicial act. It was inquiring about  
25 an ongoing proceeding, and the court held that was --

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1 THE COURT: In federal court. You had Congress and  
2 the federal judiciary, so there you do have a  
3 separation-of-powers question.

4 MR. BOUTROUS: But the question was was it a  
5 legislative or judicial act? The Supreme Court said because it  
6 was an invasion of an ongoing matter, it was a judicial act.

7 THE COURT: With no validly stated legislative  
8 purpose.

9 MR. BOUTROUS: Well, here, your Honor, they have  
10 stated their purpose.

11 THE COURT: All right.

12 MR. BOUTROUS: And they pin these other specious  
13 purposes that they claim they're seeking. The Alvin act, your  
14 Honor, we cited in our reply which we submitted yesterday.

15 THE COURT: They cited it too, I think.

16 MR. BOUTROUS: They cited.

17 THE COURT: Isn't that proof that they are, in fact,  
18 considering legislation going to some of these issues?

19 MR. BOUTROUS: No, your Honor. And in fact, the Alvin  
20 act --

21 THE COURT: How is it not?

22 MR. BOUTROUS: But let's take them at their word, that  
23 they are going to consider the Alvin act, which I find to be a  
24 rather disrespectful name, but let me give you the -- it's a  
25 bill of attainder. It's specifically directed solely at this

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1 district attorney to punish him.

2 THE COURT: Yes, but Mr. Boutrous, what you're doing  
3 now is you're arguing about what would be the validity or maybe  
4 even the constitutionality of the act should it be enacted into  
5 law. And I'm not permitted, under the long line of cases,  
6 including *Mazars*, to look at what would be the ultimate  
7 constitutionality of legislation that Congress may or may not  
8 pass.

9 MR. BOUTROUS: Totally agree, your Honor. But *Mazars*  
10 does give you much more leeway, and here's why. It holds that  
11 even if they do articulate an ostensible proper purpose, then  
12 the Court applies the four-part test in *Mazars*.

13 THE COURT: It says on the facts of *Mazars*, where you  
14 have executive privilege implicated or where you have the  
15 executive office implicated. These are four considerations  
16 that I might or a court might want to take into account, and it  
17 goes on to say there may be others.

18 MR. BOUTROUS: However, your Honor, by the time it  
19 went back to the D.C. Circuit, it was former President Trump.

20 THE COURT: I understand.

21 MR. BOUTROUS: And here, we have former President  
22 Trump's information.

23 THE COURT: No. Here, we have Mr. Pomerantz, for whom  
24 I have tremendous respect, but Mr. Pomerantz is a lay citizen,  
25 and the case law is abundantly clear that all citizens have a

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1 duty to comply with subpoenas.

2 MR. BOUTROUS: Not if they're not permissible, your  
3 Honor.

4 THE COURT: But now you're going back to the question  
5 about whether there's a valid legislative purpose.

6 MR. BOUTROUS: And if I may, your Honor? Could I just  
7 walk through the *Mazars* factors to give you a sense --

8 THE COURT: Go ahead. Sure.

9 MR. BOUTROUS: Because I do think the Supreme Court  
10 said the rationale of *Mazars* is that where you have a clash  
11 between rival branches, which the state of New York is a branch  
12 of government --

13 THE COURT: It's not a branch of the federal  
14 government, which is what *Mazars* is about.

15 MR. BOUTROUS: It is in that specific instance, but  
16 the underlying purposes, your Honor, I am confident if the  
17 Supreme Court looked at this situation, it would say that  
18 invading a state, the principles of federalism -- just like  
19 separation of powers -- protect liberty, protect against  
20 excessive abuse of power, protect it against the federal  
21 Congress coming in and acting like a federal court -- under  
22 their absolute immunity theory, they could subpoena the trial  
23 judge. They could subpoena you, and there's nothing you could  
24 do.

25 THE COURT: Well, now that you're talking about that

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1 immunity theory, you didn't address in your opening brief the  
2 speech or debate clause, which is front and center in most of  
3 the jurisprudence on these types of debates. How can you prove  
4 a likelihood of success on the merits -- which is part of your  
5 burden, right?

6 MR. BOUTROUS: Yes.

7 THE COURT: How can you prove that when, under the  
8 speech or debate clause, there is immunity? You don't dispute  
9 that there's immunity, do you?

10 MR. BOUTROUS: Your Honor, we do dispute it, your  
11 Honor, because there's not a proper legislative purpose. And  
12 under *Mazars* -- I'm going to stick with this, your Honor; I  
13 think it's absolutely correct -- it requires a heightened  
14 scrutiny because of this clash.

15 THE COURT: I understand your position on *Mazars*, but  
16 my question is on the speech or debate clause, which says  
17 nothing about -- it says that members of the House shall not be  
18 questioned in any place, and that has been broadly interpreted  
19 to mean they're immune from suit -- not just from liability,  
20 from suit.

21 MR. BOUTROUS: Your Honor, I think that under the new  
22 approach in *Mazars* in particular, that is called into question.

23 THE COURT: Where? Where in *Mazars* is that called  
24 into question?

25 MR. BOUTROUS: Well, in that case, your Honor, they

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1 originally sued -- President Trump sued the chairman of the  
2 committee, and the Congress intervened as a defendant.

3 THE COURT: They chose to waive their immunity.

4 MR. BOUTROUS: They seemingly did.

5 THE COURT: Well, they can do that, right, just like  
6 you can waive the privilege?

7 MR. BOUTROUS: Which we did not do, but the fact that  
8 they came in as a defendant in a lawsuit, under their theory,  
9 it would have meant they should have sought to dismiss it.  
10 Instead, it went to the Supreme Court; it came back to the D.C.  
11 Circuit.

12 And your Honor, if I may?

13 The reason we didn't address it at the beginning is  
14 they have often not raised the issue.

15 THE COURT: I understand.

16 MR. BOUTROUS: And so now they have, but they rely  
17 heavily on the *Eastland* case, and your Honor, the *Eastland* case  
18 was exactly our circumstance. A third party who was not  
19 subpoenaed sued their bank and Senator Eastland and some other  
20 senators. The Supreme Court, in footnote 14, made clear that  
21 the district court properly entertained the action to determine  
22 whether there was a proper legislative purpose, which is  
23 exactly what we're asking you to do and also to layer on the  
24 *Mazars* standard.

25 THE COURT: Do you win even if I reject your argument

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1 on *Mazars*?

2 MR. BOUTROUS: I think we still do, your Honor,  
3 because I think this invading a judicial proceeding, whether in  
4 state or federal court, is a judicial act.

5 The *Plaut* case that we cited, Justice Scalia, from the  
6 court, even though a statute was passed, the court held that it  
7 was more akin to a judicial act and violated the separation of  
8 powers. And I know the Court is pointing to the difference  
9 between the federal and state schemes, but it's really a triple  
10 whammy. Congress is seeking to invade the executive branch of  
11 New York, the D.A.

12 THE COURT: How? How?

13 MR. BOUTROUS: By seeking to hold him to account in an  
14 ongoing prosecution.

15 THE COURT: He's seeking information in a deposition.

16 MR. BOUTROUS: I'm quoting the speaker of the House,  
17 your Honor.

18 THE COURT: I'm talking about the subpoena. That's  
19 what's in front of me, not all the political rhetoric that's  
20 been flying back and forth.

21 MR. BOUTROUS: I understand.

22 THE COURT: That's all color. It's all theater, but  
23 it's not what's in front of me.

24 MR. BOUTROUS: Well, what's also in front of your  
25 Honor is the letter from the chairman of the judiciary

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1 committee that accompanied the subpoena --

2 THE COURT: Yes.

3 MR. BOUTROUS: -- where it said over and over it's not  
4 just oversight of the general system, it's oversight of this  
5 prosecution. He wants to know about the internal deliberations  
6 of the prosecutors.

7 THE COURT: Because he says it's been waived in this  
8 book.

9 MR. BOUTROUS: Let me go back.

10 THE COURT: You said Ms. Dubeck is going to address  
11 that.

12 MR. BOUTROUS: Yes.

13 THE COURT: Are you going to do it now --

14 MR. BOUTROUS: I could.

15 THE COURT: -- or in the rebuttal?

16 MR. BOUTROUS: How much time do I have left?

17 THE DEPUTY CLERK: Five minutes.

18 MR. BOUTROUS: Perfect.

19 Mr. Wells has also given us his five minutes.

20 THE COURT: So you're not going to argue at all,  
21 Mr. Wells?

22 MR. WELLS: No, your Honor.

23 THE COURT: OK.

24 MS. DUBECK: Good afternoon.

25 THE COURT: Hold on.

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Are you doing that now?

MR. BOUTROUS: Pardon me?

THE COURT: In other words, you're doing 25?

MR. BOUTROUS: Yes, please.

THE COURT: OK.

MR. BOUTROUS: Thank you.

THE COURT: Thank you.

Ms. Dubeck.

MS. DUBECK: The irreparable harm here is to the independent prosecutors and the chilling of prosecutorial decisions. Due process depends on the independence of prosecutors and is reflected in multiple doctrines -- grand jury secrecy -- and absolute immunity is given to prosecutors.

THE COURT: The question that I was asking you about is how has that not been waived in this book?

MS. DUBECK: Sure.

Those doctrines, those privileges and the confidences belong to my office and not to Mr. Pomerantz as a former member of the office. We took steps upon learning of the book to be published to alert Mr. Pomerantz to just remind him of his obligations to keep our confidences. He made a public statement assuring the public that he -- that the book was complying with his confidences.

THE COURT: Let me ask you a question. Have you read this book?

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1 MS. DUBECK: Yes.

2 THE COURT: Does it preserve your confidences?

3 MS. DUBECK: No. I think there are things contained  
4 in there that should not have been published and that expose  
5 Mr. Pomerantz to criminal liability under the city charter.

6 THE COURT: And have you taken any actions to enjoin  
7 distribution of the book? Did you take any action to enjoin  
8 its publication before it got published? Did you do  
9 anything --

10 MS. DUBECK: Yes.

11 THE COURT: -- with respect to your statement that you  
12 just made -- that he has waived your privileges?

13 MS. DUBECK: He has not waived our privileges because  
14 they were unauthorized disclosures. We have taken steps. We  
15 did not seek to -- we did not think that we could succeed in a  
16 case of prior restraint because we did not have a copy of the  
17 book to know what he was going to be saying, and he represented  
18 that he was not violating any of the confidences.

19 THE COURT: He represents that in the book, I will  
20 say.

21 MS. DUBECK: Moreover, at the time the book was  
22 published, the proceeding that we were trying to protect was  
23 confidential, and we had a legal obligation to maintain the  
24 grand jury's secrecy. We tried to navigate that as best we  
25 could by sending the letter. At the time we sent the letter,

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1 which was within a week of the announcement that the book would  
2 be published and a month before the book was published, we cc'd  
3 the letter to the department of investigation, which is the  
4 city department with civil and criminal jurisdiction to  
5 investigate the breaches of confidentiality that we identified  
6 as plausibly going to occur. That's the most we could say  
7 before we had read the book.

8 The city charter provisions I'm referring to  
9 2604(d)(6) and 2606(c). That latter provision makes it a  
10 misdemeanor to violate 2604(d)(6), which says a former employee  
11 may not disclose confidential information obtained as an  
12 employee.

13 Mr. Pomerantz would be exposed to misdemeanor  
14 liability if he answered questions about the work that he did  
15 in the office that is not otherwise available to the public.

16 THE COURT: Well, he's already exposed to that then,  
17 you're saying, right?

18 MS. DUBECK: I think he is, and I think if he says any  
19 words that are different or in addition to what has been  
20 written in the book, he is further exposing himself to criminal  
21 liability. And I think it's clear that the committee is not  
22 planning to just ask him to authenticate the book but is, in  
23 fact, asking for more information like what he has put in the  
24 book, and that is why we think there is an irreparable harm  
25 with going forward with the deposition, because the House rules

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1 say that no government attorney can attend the deposition; that  
2 the Chairman will make any rulings on the privilege; and that  
3 the rules can't promise confidentiality; that the interview  
4 would be available to the committee and if the committee  
5 decides it would be available to the Congress and the public.

6 What they haven't done is identified any reason that  
7 the deposition needs to happen tomorrow. They haven't  
8 identified any reason why they and I can't talk about the  
9 ability -- whether there is information that we could provide  
10 that would assist them without raising the concerns that we  
11 have about prosecutorial independence and the feeling that what  
12 they are trying to do is chill our actions rather than conduct  
13 oversight of how our office spent \$5,000 of federal forfeiture  
14 funds.

15 THE COURT: But you did admittedly do that, right?

16 MS. DUBECK: Yes.

17 THE COURT: Why is that not a valid legislative  
18 purpose -- to look into that, to better understand how it was  
19 spent and to explore whether there's legislation that might be  
20 appropriate to address that?

21 MS. DUBECK: My last letter to the committee --

22 THE COURT: My question is is that a valid legislative  
23 purpose, or why is it not?

24 MS. DUBECK: I think there is a valid legislative  
25 purpose to looking at how federal funds are spent. I don't

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1 think that this case can be a case study for them in  
2 investigating that, and there is information that we have  
3 offered to provide them, that we said we would provide on  
4 request, but they never followed up to ask for it.

5 THE COURT: But the problem is you just conceded  
6 there's a valid legislative purpose here, and once that's true,  
7 it's not my role, under all the case law, to tell them what and  
8 how they ought to conduct their inquiry. Right?

9 MS. DUBECK: If the Court were to limit the subpoena  
10 to a discussion of federal funding --

11 THE COURT: They've asserted other purposes too.

12 MS. DUBECK: Well, I don't concede that those are  
13 legislative or appropriate.

14 THE COURT: You want to switch off again?

15 MR. BOUTROUS: We're going to switch again, your  
16 Honor.

17 THE COURT: OK.

18 MR. BOUTROUS: Your Honor, just back to the  
19 legislative purpose, the first sentence of Chairman Jordan's  
20 April 6 letter, which is part of exhibit 1 --

21 THE COURT: Hold on one minute. Let me pull it out --

22 MR. BOUTROUS: Yes.

23 THE COURT: -- because I flagged it myself. So just  
24 give me one moment.

25 All right. Go ahead.

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1 MR. BOUTROUS: The first sentence is unequivocal. It  
2 says, the Committee on the Judiciary is conducting oversight of  
3 the New York County district attorney's unprecedented  
4 indictment of a former President of the United States.

5 THE COURT: But that's not the subpoena.

6 MR. BOUTROUS: The subpoena doesn't say anything, your  
7 Honor. It's an open-ended license.

8 THE COURT: I have it.

9 MR. BOUTROUS: I know, your Honor.

10 THE COURT: It's not an open ended license. It's a  
11 subpoena specifically touching on matters of inquiry committed  
12 to said committee or subcommittee.

13 MR. BOUTROUS: That's meaningless, your Honor.

14 THE COURT: It may be.

15 MR. BOUTROUS: It's meaningless.

16 THE COURT: But your cocounsel has just conceded that  
17 the letter asserts a valid legislative purpose.

18 MR. BOUTROUS: But your Honor, think about it this  
19 way. If someone came -- declared that their real, their  
20 purpose is to conduct oversight of an ongoing criminal  
21 prosecution -- and that's improper -- and then they toss in a  
22 bunch of other things, that doesn't make the fundamental  
23 purpose legitimate.

24 THE COURT: You're saying that's the fundamental  
25 purpose. They have said in their briefing that there are three

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1 valid legislative purposes, one of which you've just conceded  
2 is valid.

3 MR. BOUTROUS: Those are the *post hoc* rationalizations  
4 of lawyers.

5 THE COURT: That's your characterization of it, and  
6 the cases tell me if I find a valid legislative purpose, I am  
7 not allowed to look at the motivations on either side.

8 MR. BOUTROUS: Your Honor, I don't think that --  
9 again, back to *Mazars*, *Mazars* said that you look at the  
10 evidence of -- even if they articulate purposes. There's no  
11 evidence.

12 THE COURT: There is evidence. You've sent a letter  
13 conceding that you used \$5,000 of federal forfeiture funds in  
14 connection with the investigation.

15 MR. BOUTROUS: Not in connection with the  
16 investigation of President Trump that resulted in the  
17 indictment. And that's what they supposedly are investigating.

18 *Watkins*, your Honor, says that the purpose --

19 THE COURT: You're saying that's what they're  
20 investigating. They say they're investigating the use of  
21 federal funds.

22 MR. BOUTROUS: They say they are investigating -- they  
23 are conducting oversight of the D.A.'s office, your Honor.  
24 They can't get around that. I'm not sort of speculating.

25 THE COURT: But you can't get around that they also

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1 say they want to investigate the use of federal funds, and your  
2 cocounsel has just conceded that would be a valid legislative  
3 purpose.

4 MR. BOUTROUS: But several cases, including one that  
5 they cite -- **the** *McPhaul* case says that if the subpoena is  
6 irrelevant to or has no connection to the supposed asserted  
7 purpose, then it's not proper. *Watkins* says it can't be a  
8 flimsy relationship. This is a -- your Honor, again, what the  
9 Supreme Court said holds. This Court does not have to blind  
10 itself to what we can all see and what the Chairman said.

11 The last point I'll make before I sit down, leaving  
12 some time for rebuttal, is, the Court asked about --

13 THE COURT: I'm sorry.

14 MR. BOUTROUS: If the Court were to conclude --

15 THE COURT: The Court asked?

16 MR. BOUTROUS: On the immunity point.

17 THE COURT: Oh, yes. Thank you.

18 MR. BOUTROUS: So, if the Court right now is thinking  
19 that we're not likely to succeed on the immunity issue, then we  
20 still can proceed. The Rule 19 indispensable party argument is  
21 novel. It's not supported by anything.

22 THE COURT: It's supported by the federal rules, they  
23 say.

24 MR. BOUTROUS: It's not, because --

25 THE COURT: So are you proposing we should let this

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1 lawsuit go forward with your client, the D.A.'s office, as the  
2 plaintiff and Mr. Pomerantz as the defendant?

3 MR. BOUTROUS: Yes, your Honor.

4 THE COURT: And Mr. Pomerantz has publicly stated he  
5 will take his instructions from your office.

6 MR. BOUTROUS: Yes.

7 THE COURT: So we should have a lawsuit between two  
8 parties, one of whom is following the instructions of the other  
9 party?

10 MR. BOUTROUS: Well, it's three parties -- four  
11 parties now, or more.

12 THE COURT: Right.

13 MR. BOUTROUS: Well, two of them don't want to  
14 participate. They can make their arguments.

15 THE COURT: Two of them are saying they have immunity,  
16 and you have, therefore, a problem with likelihood of success  
17 on the merits. That's what they've said so far.

18 MR. BOUTROUS: They've expressed their views on the  
19 merits. They've participated. They could file an *amicus*  
20 brief, like they did in the *Bannon* case. They could file and  
21 intervene back in, like they did in *Mazars*.

22 THE COURT: How are they not a necessary party when  
23 they're the ones that have served the subpoena that you're  
24 seeking to enjoin?

25 MR. BOUTROUS: We can get adequate relief without

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1       them, and they could protect their interests.

2               In contempt actions, like *Watkins*, your Honor,  
3 Congress isn't a party to that and their interests are well  
4 represented and they're not an indispensable party.

5               THE COURT: Right.

6               MR. BOUTROUS: With that, I'll reserve.

7               THE COURT: Thank you, Mr. Boutrous.

8               MR. BOUTROUS: Thank you.

9               THE COURT: I will hear, then, from counsel for the  
10 committee.

11              Mr. Berry, right?

12              MR. BERRY: Yes.

13              THE COURT: Thank you.

14              MR. BERRY: Thank you, your Honor.

15              May it please the Court?

16              Setting aside the hyperbole and the rhetoric, this  
17 motion is about a single-deposition subpoena issued by the  
18 House Judiciary Committee to Mr. Pomerantz.

19              THE COURT: All right. But Mr. Berry, what do you say  
20 about Mr. Boutrous's accurate argument that the first line of  
21 the cover letter accompanying the subpoena says that you're  
22 asserting oversight over the district attorney's -- let me find  
23 the exact wording -- conducting oversight of the New York  
24 County district attorney's unprecedented indictment of a former  
25 President of the United States and current declared candidate

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1 for that office.

2 MR. BERRY: Yes, it is true.

3 THE COURT: How is that a valid legislative purpose?

4 MR. BERRY: Because we are looking into whether or not  
5 there is a problem with politically motivated prosecutions of  
6 former Presidents and politically motivated prosecutions of  
7 former Presidents using federal funds. And the federal funds  
8 legislative purpose, I think, is absolutely valid, as the  
9 plaintiffs have now conceded. What we have not discussed is  
10 the federal interest in the former Presidents.

11 In the Former Presidents Act of 1958, Congress  
12 recognized that the interest of the American people in the  
13 President does not cease to exist when he leaves office. He  
14 gets lifetime Secret Service protection. He gets federal  
15 office space. He gets money for staff. He gets travel funds.  
16 And the question is if you have politically motivated  
17 prosecutions or investigations of former Presidents, can that  
18 affect their conduct while in office?

19 THE COURT: Let me ask you a question. Do you need  
20 your adjectives of "politically motivated" then if you're  
21 telling me that a valid legislative purpose is all of these  
22 protections of a President or a former President and the need  
23 to avoid interference with exercise of presidential powers  
24 while in office? Does the prosecution have to be politically  
25 motivated to implicate those concerns?

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1 MR. BERRY: I don't think that it has to, but I  
2 think --

3 THE COURT: Then why are we having all this  
4 conversation about what the D.A.'s motives are in bringing the  
5 case that it brought?

6 MR. BERRY: Because it makes the case for federal  
7 action stronger, your Honor. If you have a situation --

8 THE COURT: Doesn't it politicize it on your side as  
9 well?

10 MR. BERRY: I don't think so, your Honor. And if I  
11 could explain?

12 If you have a situation where Presidents, while  
13 they're in office, feared that because of the decisions they  
14 make while in office, state and local prosecutors around the  
15 country are going to make them target No. 1 for prosecutions,  
16 that could impact the way they conduct themselves in office.  
17 Let's say, for instance, they have something that they feel is  
18 in the national interest but it would be very unpopular in New  
19 York City. If they fear a prosecution in New York City, will  
20 they tailor their behavior in order to avoid prosecutions?

21 Similarly, if they fear that they're going to be  
22 subject to a prosecution in a city, will they tailor their  
23 agenda so that they will become more popular in a city, thus  
24 warranting off prosecutions and investigations?

25 And this is not an issue about just one person, your

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1 Honor. There's already talk that there could be politically  
2 motivated prosecutions or investigations of the current  
3 President once he leaves office. And the idea that there's no  
4 federal interest in stopping that from happening or at least  
5 developing legislation to try to ameliorate the effects of  
6 that, I think, is something that the plaintiff has never  
7 rebutted. We've expressed this theory in letter after letter.  
8 We put it in the brief, and they've never rebutted it.

9 THE COURT: In all of the cases that I've looked at,  
10 including *Mazars*, frankly, the court never did rule on the  
11 validity of the subpoena in *Mazars* at the end of the day. It  
12 remanded it back, and the parties then talked to each other,  
13 like civilized professionals, and presumably they worked  
14 something out. Why can't that happen here?

15 MR. BERRY: So, we issued a subpoena to Mr. Pomerantz.

16 THE COURT: Right.

17 MR. BERRY: The next thing that happened was that we  
18 were brought into this court. We think we're immune from this  
19 suit. We were not contacted by Mr. Pomerantz, who said,  
20 listen, I'm willing to discuss with you topics A, B and C.

21 THE COURT: You were or you were not?

22 MR. BERRY: We were not.

23 THE COURT: You were not.

24 MR. BERRY: We were not contacted by the District  
25 Attorney's Office to say OK, do you want to talk to

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1 Mr. Pomerantz about A, B, or C. We were just brought into  
2 court. The plaintiff is asking the Court not only --

3 THE COURT: But as I understand it, there were  
4 attempts by the D.A.'s office to reach out to try to talk to  
5 you about the scope of the subpoena.

6 MR. BERRY: No.

7 THE COURT: Am I wrong about that?

8 MR. BERRY: No, the D.A.'s office has not reached out  
9 to us once to discuss the scope of the subpoena.

10 THE COURT: There were no letters sent to you about  
11 the timing and about the scope?

12 (Indiscernible overlap)

13 MR. BERRY: Not after the subpoena was issued, no.

14 THE COURT: Well, you issued the subpoena, after you  
15 tried, which may be the more appropriate way to do things; I  
16 don't know. You tried to informally get information.  
17 Certainly there were letters back and forth then.

18 MR. BERRY: There were letters back and forth, and we  
19 did receive the valuable piece of information that they spent  
20 \$5,000 of federal forfeiture money on this investigation. But  
21 it's up to Congress to determine how it's going to structure  
22 its investigation. We were not getting much cooperation. We  
23 issued a subpoena, and not only did they haul us into court to  
24 try to enjoin the subpoena, which I think that this Court has  
25 no power to do, they have also asked --

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1 THE COURT: Why do I have no power to do it?

2 MR. BERRY: I think that it is precluded by the speech  
3 or debate clause to the U.S. Constitution, and I think that  
4 because there's a valid legislative purpose for the subpoena --

5 THE COURT: OK. But I do first have to determine is  
6 there or is there not a valid legislative purpose, correct?

7 MR. BERRY: You do have to determine whether or not  
8 the subpoena, the investigation relates to topics on which  
9 legislation could be had.

10 THE COURT: Right.

11 MR. BERRY: Absolutely.

12 THE COURT: OK.

13 MR. BERRY: But we issued the subpoena. If  
14 Mr. Pomerantz or the D.A.'s office wanted to have a  
15 conversation about that subpoena to try to narrow it, we could  
16 have done it. Instead, we were hauled into court not only to  
17 enjoin the subpoena, but in the complaint the plaintiff's asked  
18 me to say that preemptively we cannot issue any subpoenas to  
19 any current or former D.A.'s office employees.

20 THE COURT: Yes, I do know that, and we didn't have a  
21 chance to talk about that, Mr. Boutrous and I or Ms. Dubeck and  
22 I. So perhaps on rebuttal we can talk about that, because that  
23 is certainly part of the relief sought in this lawsuit.

24 MR. BERRY: So I think there's a valid legislative  
25 purpose in terms of the interest of former Presidents and

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1 federal government's interest in that. There's a federal  
2 removal bill that we cite in our brief that deals with that  
3 issue that's under consideration.

4 THE COURT: Is that what has been, I have to say,  
5 pejoratively referred to as the Alvin bill?

6 MR. BERRY: That is not the Alvin bill, your Honor.  
7 We do not cite that in our brief.

8 THE COURT: No, you don't.

9 MR. BERRY: This is a bill that was introduced by  
10 Congress that says if you have an indictment of a former  
11 President, it can be removed to federal court, where you could  
12 have federal judges of life tenure overseeing such prosecution.

13 THE COURT: So that bill has been introduced.

14 MR. BERRY: It is. It's cited in our brief, your  
15 Honor.

16 There's also a bill that would restrict the use of  
17 federal forfeiture funds in investigations of current or former  
18 Presidents or vice presidents.

19 THE COURT: If you've already introduced the bills,  
20 why do you need testimony then at this point?

21 MR. BERRY: Because for Congress to introduce them,  
22 there has to be consideration given as to whether they're  
23 necessary.

24 THE COURT: Don't you normally do that before you  
25 introduce something?

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1 MR. BERRY: Congressmen introduce bills all the time.  
2 Then committees hold hearings and give deliberation in terms of  
3 whether or not this is a bill that's worthy of moving forward.  
4 There are thousands of bills that are introduced each Congress.  
5 Not all of them, and the small minority of them, make it  
6 through. So you have hearings after you've introduced bills to  
7 see whether or not they're necessary.

8 Your Honor, if I could also move to the *Mazars* case  
9 given how much emphasis the plaintiffs put on it, I have two  
10 points to make here.

11 First of all, *Mazars* does not implicate the speech or  
12 debate clause protection that the committee has. And in  
13 particular, I want to point your Honor to *Meadows v. Pelosi*.  
14 So, you had a case about a subpoena directed to the former  
15 chief of staff of the White House, a clear executive  
16 branch-legislative branch clash. The D.C. federal district  
17 court said that *Mazars* had no bearing on whether or not that  
18 subpoena was protected by the speech or debate clause. So if a  
19 subpoena that was issued to the former chief of staff of the  
20 White House, and it implicates executive branch and legislative  
21 branch prerogatives, is protected by the speech or debate  
22 clause, then I think that the answer here in terms of whether  
23 or not the subpoena is protected by the speech or debate clause  
24 is the same.

25 THE COURT: What is your argument with respect to

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1 speech or debate clause? Is it that they can't show likelihood  
2 of success on the merits, and therefore, I should deny the  
3 relief they're requesting?

4 MR. BERRY: Absolutely. I think because of the speech  
5 or debate clause they cannot show likelihood of success on the  
6 merits.

7 The second issue I wanted to raise with respect to  
8 *Mazars* -- and I agree with much of what your Honor said  
9 before -- is that that case depended upon the unique nature of  
10 the presidency.

11 THE COURT: So it your position that *Mazars* is  
12 limited to that factual context?

13 MR. BERRY: It is. To the extent the Supreme Court  
14 wishes to extend it, it could extend it, but I don't think the  
15 lower courts can.

16 The court said there the President is the only person  
17 who alone composes a branch of government. They also said the  
18 President's unique constitutional status means that Congress  
19 may not look to him as a case study for general legislation.

20 The uniqueness of the presidency was key to *Mazars* and  
21 that four-part test. It's not even clear that it would apply  
22 to the vice president of the United States, the secretary of  
23 transportation, the secretary of health and human services. I  
24 think that there is no way you can read *Mazars* then to say that  
25 that four-part test and heightened scrutiny applies to a

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1 subpoena for information from a former special assistant  
2 district attorney in New York County.

3 THE COURT: Before you get there, do you agree that  
4 the test articulated in *Mazars* is a, quote, heightened  
5 scrutiny?

6 MR. BERRY: I do agree that it is more scrutiny than  
7 is given to a standard congressional subpoena. If you get past  
8 immunity problem, it is heightened scrutiny.

9 THE COURT: Well, what is the standard that you say  
10 should apply here?

11 MR. BERRY: The standard is does this investigation  
12 and this subpoena relate to a subject upon which legislation  
13 could be had? Is there a valid legislative purpose? And here,  
14 the plaintiff has already conceded one valid legislative  
15 purpose, which is the use of federal funds, is this the type of  
16 investigation where federal funds should be used, and they've  
17 really not made any serious attempt to rebut our second federal  
18 purpose about the protection and treatment of former Presidents  
19 in terms of politically motivated prosecutions and  
20 investigations, how that could impact the exercise of the  
21 office of -- the exercise of the powers of the office of the  
22 President of the United States.

23 And this is an exceptional deferential test that  
24 courts use, as the court said in *Brewster*, in *Johnson*. The  
25 Supreme Court said don't look at motives in terms of

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1 determining legislative purpose. So I think that in terms of  
2 the legislative purpose, we have two very strong legislative  
3 purposes that have not been rebutted.

4 I'd also like to talk briefly, if I may, about the  
5 privilege issues, your Honor.

6 THE COURT: Yes. Give me one second.

7 Is it your position that there are just two purposes  
8 that they re invoking?

9 MR. BERRY: So, with respect to the subpoena of  
10 Mr. Pomerantz, we are primarily focused on the interest in the  
11 former President and the use of federal funds. There is an  
12 issue in terms of the protection of the President while he's in  
13 the criminal justice system.

14 THE COURT: Is that your removal point?

15 MR. BERRY: No. That deals with the treatment in the  
16 criminal justice system and issues about protection, and the  
17 like. I do not believe that those are of substantial relevance  
18 to this particular subpoena or this particular deposition.

19 THE COURT: OK.

20 All right. I would like to talk to you about the  
21 privilege point, so go ahead.

22 MR. BERRY: With respect to the privilege issues, as  
23 you pointed out, Mr. Pomerantz has written a book about the  
24 investigation of the former President. That's not all, though.  
25 He has answered questions about that work in numerous

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1 high-profile television interviews. He's talked to 60 Minutes.  
2 He's answered questions to Rachel Maddow, Good Morning,  
3 America, etc. Once the book came out, we're unaware of any  
4 action that the plaintiff took to try to get him to stop  
5 answering questions about this material. The only time where  
6 the plaintiff has gone to court and taken any substantive  
7 action to try to get him to stop talking is when a duly issued  
8 congressional subpoena was issued and the House Judiciary  
9 Committee wants to ask him questions about that issue.

10 So as I understand it, their position basically is if  
11 he wants to go on to Rachel Maddow, if he wants to star on 60  
12 Minutes, we're going to sit on our hands and not actually do  
13 anything, but when the House Judiciary Committee wants to ask  
14 him questions about that very same topic, then we need  
15 emergency relief from the federal court.

16 I don't think that this is reasonable behavior if you  
17 think this is privileged material. I don't think that this is  
18 the type of behavior that this Court should countenance -- that  
19 somehow the House Judiciary Committee ranks below 60 Minutes in  
20 terms of the protection of privilege or in terms of the public  
21 interest in having the material in his book discussed.

22 THE COURT: All right.

23 Mr. Berry, the court, in *Mazars*, said the following:  
24 "Recipients" of a subpoena "have long been understood to retain  
25 common law and constitutional privileges with respect to

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1 certain materials, such as attorney-client communications and  
2 governmental communications protected by executive privilege."

3 MR. BERRY: Yes.

4 THE COURT: Do you intend to respect the invocation of  
5 privilege if this deposition were to go forward?

6 MR. BERRY: So, if this deposition were to go forward,  
7 this is the way it would work. Mr. Pomerantz would be asked a  
8 question. If he feels, if he would like, if he feels that a  
9 privilege should be invoked or he's been instructed to invoke  
10 the privilege, then the committee chair will make a decision on  
11 a case-by-case basis of whether to sustain that privilege. If  
12 Mr. Pomerantz is unsure whether or not a question involves a  
13 privilege -- he's not being held hostage in the room -- he's  
14 free to go outside the room if he wants to consult with an  
15 attorney from the D.A.'s office about whether the question  
16 implicates privilege; he can do so. Decisions are made on  
17 privilege in congressional depositions on a  
18 question-by-question basis.

19 Then, if it's overruled and he still refuses to answer  
20 on the basis of privilege, generally those questions are then  
21 saved for the end. At that point, Mr. Pomerantz would be free  
22 to go. The way this works then is the committee gives  
23 Mr. Pomerantz another chance. They would write him a letter  
24 exploring the questions that they would still like answered  
25 that Mr. Pomerantz refused to answer on the basis of privilege.

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1 He would then be able to come back and either answer the  
2 questions or make additional -- explain more why he thinks it's  
3 covered by privilege.

4 If he still refuses to answer, then the committee  
5 would have a decision to make. Would they try to do civil  
6 enforcement of the subpoena and require him to ask by going to  
7 court itself, where we don't have speech or debate clause  
8 relief, or would they seek to hold him in contempt, in which  
9 case there has to be a committee vote. There has to be a vote  
10 of the full House, and then that would have to be referred to  
11 the Justice Department to see if they want to go forward.

12 But the key question is Mr. Pomerantz, if he shows up  
13 tomorrow and invokes privilege, he's not going to be held in  
14 contempt tomorrow. He's free to present whatever privilege  
15 arguments he wants, on a question-by-question basis, and then  
16 the committee will make a decision. And I would point your  
17 Honor to the Harriet Miers case from the federal district court  
18 in 2008.

19 There, the former counsel to the President of the  
20 United States, not a former special assistant district  
21 attorney, said I don't want to come, I'm absolutely immune  
22 because of executive privilege, I should not be required to  
23 show up at all. And what did the federal district court there  
24 say? The federal district court said no, you do not have  
25 absolute immunity. You do not just get to say I'm not showing

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1 up. You have to show up, but if you want to assert executive  
2 privilege in response to questions, you can do that. And  
3 Mr. Pomerantz is free to assert privileges if he shows up  
4 tomorrow with respect to particular questions. Then the  
5 committee can ask questions to elicit the basis of the  
6 privilege claims and they adjudicate them on a  
7 question-by-question basis.

8 What there's no precedent for, your Honor, is a court  
9 saying you do not have to show up for a congressional  
10 deposition because you intend to make some privilege claims.

11 THE COURT: Isn't Mr. Pomerantz, who now,  
12 unfortunately, said he doesn't wish to be heard and is being  
13 heard really by just saying I agree with what the D.A.'s office  
14 says, but in any event, isn't he being put in a little bit of a  
15 difficult position here, where either he answers your questions  
16 and potentially violates his ethical duties to the office of  
17 the district attorney, or he refuses to answer and then he  
18 faces potential contempt?

19 MR. BERRY: I guess I would have two answers to that,  
20 your Honor.

21 First, people that are being deposed by Congress, it  
22 is standard that they do not get judicial review up front of  
23 their privilege claims, or the like. So if they wish to assert  
24 privilege claims and they are going to refuse to answer even if  
25 all those privilege claims are overruled, they have to rely on

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1 judicial review at the back end, and that is not in any way  
2 unique to Mr. Pomerantz. That is anybody who shows up for a  
3 congressional deposition.

4 But secondly, your Honor, this is a case where there  
5 is diversity between Mr. Bragg and Mr. Pomerantz, on one side,  
6 and the committee, on the other. Mr. Pomerantz is objecting to  
7 the subpoena. He says he agrees with Mr. Bragg's arguments,  
8 and so even though they've tried to set up this formality,  
9 where Mr. Bragg is suing Mr. Pomerantz and us --

10 THE COURT: Yes, but under all the line of cases, he  
11 is appropriately a nominal defendant; no?

12 MR. BERRY: He is a nominal defendant, but he's joined  
13 in the request for relief and says he opposes the subpoena.

14 THE COURT: Yes, he did. Yes, he did.

15 MR. BERRY: So he is not a neutral third party that  
16 was referred to in the *Eastland* case. He is someone that has  
17 come in and is opposing the subpoena and objecting to it. So I  
18 think that even if one were to say that there's a special  
19 exception for neutral third parties, that doesn't apply to him  
20 anymore.

21 Also, with respect to Rule 19 joinder, and this is one  
22 point I wanted to make, your Honor, the Second Circuit has been  
23 clear, both in cases involving state sovereign immunity,  
24 invoked by the state of New York, and by Indian tribes in terms  
25 of their immunity, that when you look at the Rule 19(b)

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1 factors, that if we are an indispensable party -- and I would  
2 strongly argue that we are an indispensable party -- and if we  
3 are immune, then the No. 1 factor in determining whether the  
4 other claims should be dismissed as well, the other defendants,  
5 is the immunity. And I would submit, your Honor, that if the  
6 state of New York thinks that it is an indispensable party and  
7 because of its sovereign immunity, claims brought by the Seneca  
8 Nation in that case that we cited in our brief, that that  
9 warranted dismissing the claims so that Seneca Nation could not  
10 get relief on anything or, your Honor, if the Second Circuit  
11 says with respect to Indian tribes and their immunity, the  
12 overwhelming importance of that immunity overrides the other  
13 Rule 19 factors, I would submit, your Honor, that the speech or  
14 debate clause in congressional immunity is no less deserving of  
15 the judiciary's respect than the state of New York's sovereign  
16 immunity when they have made this Rule 19 argument or the  
17 Indian tribes when they have made this argument. And so your  
18 Honor, I think we don't even have to get to that point because  
19 in terms of likelihood of success on the merits, this is  
20 covered by the speech or debate clause; there's really more  
21 than one valid legislative purpose, and also with respect to  
22 irreparable harm, your Honor, plaintiff --

23 THE COURT: How can they?

24 MR. BOUTROUS: With respect to irreparable harm,  
25 Mr. Pomerantz has already written the book. He's already given

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1 all these television interviews in public. It's a best-selling  
2 book, by the way; it made the top ten of the New York Times  
3 bestseller list. He's given interviews on 60 Minutes, which is  
4 the most watched news magazine in the country. He's shared all  
5 this information in public, tens of millions of people. Then  
6 the District Attorney's Office is saying if he talks about  
7 those topics in a room in the Capitol, where there will not be  
8 any reporters, and answers questions about those same topics  
9 they will somehow be irreparably harmed --

10 THE COURT: Is it your position there's been a waiver  
11 with respect to what has been said in the book, or are you  
12 arguing a subject matter waiver?

13 MR. BERRY: I think that, at a minimum, there is  
14 waiver in terms of what has been said in the book. In terms of  
15 whether or not there's been complete subject matter waiver, I  
16 think that if Mr. Pomerantz or Mr. Bragg wants to make that  
17 argument that there's not been subject matter waiver, if  
18 Mr. Pomerantz shows up at the deposition and there's a question  
19 that implicates that, that argument can be advanced and the  
20 committee would have to consider it.

21 I'm not authorized here to state that because that has  
22 not been brought to our attention yet.

23 THE COURT: OK.

24 MR. BOUTROUS: But where is the irreparable harm, your  
25 Honor? Mr. Pomerantz is not working to prepare for the trial

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1 of former President Trump. All of this information is already  
2 out there, and he did not express any theory in terms of how  
3 this is imminent harm to the state of New York.

4 THE COURT: So you have to admit that it is somewhat  
5 unusual to, as you say in your cover letter, for Congress to  
6 exercise oversight of a local district attorney's prosecution.  
7 Is it not?

8 MR. BERRY: I would say that it's not the ordinary  
9 course of events. It's also not the ordinary course of events  
10 for Congress to go after the -- you know, to do many types of  
11 investigations. But what I would say is that we have shown  
12 that this is related to valid legislative purposes. And in  
13 particular, if we are concerned about, and that you think that  
14 there's a substantial federal concern in dealing with  
15 politically motivated prosecutions of former Presidents, part  
16 of an investigation into whether or not we need to take  
17 legislative steps to address that problem is looking into  
18 what's going on in terms of the investigations of former  
19 Presidents.

20 THE COURT: How far can you go with that without  
21 stepping on what clearly is immunity of this office to conduct  
22 its own prosecutions and investigations?

23 MR. BERRY: What I would say, your Honor, is that we  
24 are proceeding in a very measured, modest way. You will notice  
25 we have issued one subpoena, and that is to Mr. Pomerantz.

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1 Hopefully, he will cooperate and we can get information from  
2 him. I'm not authorized to nor has the committee made any  
3 decision about what it's going to do in terms of any future  
4 subpoenas. If we do issue such subpoenas and they were  
5 challenged, we would litigate about those.

6 But the main point I would like to make is that  
7 plaintiff wants this case and this motion to be about things  
8 other than the subpoena to Mr. Pomerantz, because I think they  
9 realize how weak their case is with respect to the subpoena of  
10 Mr. Pomerantz. That's why you have the implication of other  
11 things that are going on. You have the rhetoric and the  
12 hyperbole. I would urge your Honor to focus just on the  
13 subpoena of Mr. Pomerantz. Ask is there a subject upon which  
14 legislation could be had? Is there a valid legislative  
15 purpose? Have they shown that there will be irreparable harm  
16 for the Court to take the extraordinary step, for the first  
17 time we're aware of, of enjoining a subpoena for a  
18 congressional deposition? And I think, your Honor, if you ask  
19 yourself those questions, the Court will come to the conclusion  
20 that there is no substantial likelihood of success on the  
21 merits in this case. There is no showing of actual and  
22 imminent irreparable harm and that consistent with case after  
23 case where people have gone to court and tried to get  
24 congressional subpoenas enjoined -- whether it be *Meadows v.*  
25 *Pelosi*, whether it be the *Ward* case, **whether it be the Freiss**

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1 case -- that this Court should decline to issue a preliminary  
2 injunction, to respect the speech or debate clause, respect  
3 legislative prerogatives, and leave other matters for other  
4 days if the committee chooses to take those steps.

5 And with that, I will let my learned colleague come  
6 in.

7 THE COURT: OK. Thank you.

8 MR. BOUTROUS: Thank you.

9 Your Honor, first, we are not seeking relief on this  
10 motion for anything other than this subpoena.

11 THE COURT: Right. That was one question I did have  
12 for you, Mr. Boutrous, because you do have a second count in  
13 your complaint in which you seek injunctive relief with respect  
14 to anything that might be issued in the future. You're not  
15 asking me --

16 MR. BOUTROUS: Not today. If they come after us  
17 similarly again in the office and continue this pattern, then  
18 we need to come back before you.

19 THE COURT: OK.

20 MR. BOUTROUS: Your Honor, it is totally unprecedented  
21 for Congress to ever go after local prosecutors in any context  
22 and conduct oversight, totally.

23 THE COURT: I understand that, but it's also  
24 unprecedented for a local district attorney to bring a criminal  
25 indictment against a former President. Correct?

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1 MR. BOUTROUS: That's correct, your Honor.

2 THE COURT: So in connection with that, Mr. Berry has  
3 said Congress is exploring whether there is legislation that is  
4 appropriate in order to protect people who serve in the office  
5 of President, both while they're in office and after they  
6 leave.

7 MR. BOUTROUS: Your Honor, two points on that.

8 First of all, let's say that they really do want to  
9 look at that, they just came up with this, like this is isn't  
10 something they've been wrestling with.

11 THE COURT: But you just brought the indictment.

12 MR. BOUTROUS: Exactly. They're doing it to punish  
13 and deter and --

14 THE COURT: No, but --

15 MR. BOUTROUS: Go ahead.

16 THE COURT: You're asking me to assume that. They're  
17 telling me they're doing it because the indictment raises, in  
18 their mind, legitimate concerns, which Congress has a right to  
19 investigate to see whether there's legislation that's  
20 appropriate.

21 MR. BOUTROUS: Let me accept that premise, your Honor.

22 THE COURT: Yes.

23 MR. BOUTROUS: Why now? Why can't they do --

24 THE COURT: But if you accept that premise, isn't that  
25 the end of the inquiry?

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1 MR. BOUTROUS: No, your Honor. I go back to *Mazars*.  
2 The Court asked about what happened in *Mazars*, and you were  
3 right. Chief Justice Roberts thought that there should be a  
4 hashing out --

5 THE COURT: Yes.

6 MR. BOUTROUS: In *Mazars*, the case went back to the  
7 D.C. Circuit, and far from immunity, the chairman of the  
8 committee at that point issued a 58-page explanation of the  
9 subpoena instead of press releases and tweets, and the D.C.  
10 went assiduously down. It didn't enjoin the subpoena, but it  
11 substantially narrowed it, and I think the chief justice and  
12 the court would be shocked if they thought they went through  
13 all that work in *Mazars* to create this test, which is -- I  
14 think Mr. Berry is understating its impact. It's a dramatic  
15 change in the scrutiny for subpoenas from Congress, that  
16 Congress could avoid it by simply seeking to just get out of  
17 the case or not intervening. That, I don't think, is what the  
18 Supreme Court intended. Why wouldn't they have had immunity in  
19 the *Mazars* case?

20 THE COURT: Why didn't you wait, then, for Congress to  
21 bring a case to enforce the subpoena? Wouldn't that take care  
22 of this problem?

23 MR. BOUTROUS: Well, they might have gone straight to  
24 contempt, your Honor, which it sounds like they're  
25 contemplating, and the Supreme Court --

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1 THE COURT: But what's your interest in that?

2 MR. BOUTROUS: Well, our information --

3 THE COURT: You're not going to be held in contempt.

4 MR. BOUTROUS: That's true.

5 THE COURT: The subpoena's not addressed to you. It's  
6 addressed to Mr. Pomerantz.

7 MR. BOUTROUS: That's true, your Honor, but as you  
8 pointed out, Mr. Pomerantz is in -- New York authorities  
9 enforcing New York law.

10 THE COURT: Are you representing Mr. Pomerantz?

11 MR. BOUTROUS: No. I'm going to point out why it's in  
12 our interest, because he's in a space for contempt, and he  
13 might decide, under those circumstances, to disclose  
14 confidential information, deliberations information that  
15 they're seeking, grand jury information.

16 THE COURT: Does this book not reveal deliberation  
17 information? You can't credibly say that it doesn't.

18 MR. BOUTROUS: We sought to stop it from happening.  
19 And that point I wanted to make, your Honor, this court has  
20 found that it would have been a First Amendment prior  
21 restraint. So that's why we didn't go running into court to  
22 try to enjoin it.

23 THE COURT: No, but you also didn't, after  
24 publication, take any steps -- in litigation anyway -- to try  
25 to enjoin further distribution of the book.

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1 MR. BOUTROUS: But the district attorney did and I  
2 believe is taking action to inquire into those matters, and  
3 so --

4 THE COURT: You didn't say any of that in your papers  
5 to me.

6 MR. BOUTROUS: I believe it's correct, your Honor, and  
7 I think I have one minute left.

8 (Indiscernible overlap)

9 MR. BOUTROUS: I want to stick to the time.  
10 Two cases the Court asked me about -- vertical  
11 federalism and --

12 THE COURT: No, I didn't ask about vertical  
13 federalism. I asked isn't this federalism and not separation  
14 of powers.

15 MR. BOUTROUS: Excuse me. Vertical separation of  
16 powers. This is from the *LaRoque* case that we cited in our  
17 reply brief which talks about it.

18 And then, your Honor, on the federal funding, I just  
19 want to be very clear that the record is clear here in this  
20 case that the \$5,000 was used for the righteous prosecution  
21 that resulted in the conviction of the Trump Organization. It  
22 was not used in connection with the indictment and prosecution  
23 of President Trump that we're here talking about today.

24 THE COURT: That's not really before me, is it?

25 MR. BOUTROUS: I think it is, because *Watkins* and

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1 other cases say where there's a flimsy connection between the  
2 subpoena and supposed legislative purpose, that's a ground for  
3 not enforcing it.

4 THE COURT: Right.

5 MR. BOUTROUS: And again, I think the *Mazars* case  
6 makes very clear the Court can scrutinize, it can limit the  
7 subpoena, and therefore, we would ask you to do that. I know  
8 these are really thorny issues. I do think that the Supreme  
9 Court did not intend for Congress to avoid separation of powers  
10 issues, and the like, by invoking immunity. And *Eastland* says  
11 you can't do that.

12 THE COURT: All right. Thank you.

13 MR. BOUTROUS: Can I make one procedural point, your  
14 Honor?

15 In the event the Court doesn't agree with us, we would  
16 like time to seek a stay and go to the Second Circuit.

17 THE COURT: Look, I don't know what you want me to do  
18 about time. That's why I'm holding you strictly to the time  
19 limits for oral argument here. It's 3 o'clock. You brought  
20 your application on when you did, which, by the way, you  
21 brought on improperly, without even serving the other side with  
22 the complaint, never mind with your motion. You did it *ex*  
23 *parte*. You didn't include the affidavit that our local rules  
24 require you to file. Then you filed the reply brief yesterday,  
25 which was not authorized by the scheduling order that I put in

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1 place, which I concede was truncated, but that's because of the  
2 urgency here. So I can't do anything about the time. It is  
3 what it is.

4 MR. BOUTROUS: No, your Honor.

5 THE COURT: My intent is to wrap up the hearing  
6 momentarily and, as promptly as I can, get a decision  
7 published. And then you can seek whatever relief you want to  
8 seek, if you need it, or if the other side needs it.

9 MR. BOUTROUS: We do appreciate it. I just wanted,  
10 I'm hereby giving notice. We did not intend to come in without  
11 giving notice when we came. We were in the process of  
12 notifying them.

13 THE COURT: But you did.

14 MR. BOUTROUS: We were in the process, but here we  
15 are, your Honor.

16 THE COURT: But you filed it, Mr. Boutrous. I mean,  
17 look, I don't want to waste a lot of time on this, but you're a  
18 very experienced litigator. Going into court *ex parte* seeking  
19 a TRO pursuant to a proposed order to show cause without  
20 providing notice is somewhat unusual, and our rules require an  
21 affidavit from you about the steps you took and why notice  
22 could not be given. And you didn't do that. So I don't want  
23 to belabor it, but that is how we got here.

24 MR. BOUTROUS: Understood, your Honor. And we will  
25 then just await your ruling and move promptly if we think we

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1 need more relief.

2 THE COURT: Mr. Berry, I think you have three minutes.

3 MR. BERRY: Yes. I will not take more time than  
4 necessary, your Honor.

5 I just wanted to point out that in the letter that was  
6 sent to Chairman Jordan, the District Attorney's Office said --

7 THE COURT: Where is this? Is it in the record?

8 MR. BERRY: Yes. This is document 12-20, ECF document  
9 12-20, on page 5 of that document.

10 THE COURT: All right. Thank you.

11 MR. BERRY: It says, our review of the office's  
12 records reflect that of the federal forfeiture money that the  
13 office helped collect, approximately \$5,000 was spent on  
14 expenses incurred relating to the investigation of Donald J.  
15 Trump or the Trump Organization. It talks about when they were  
16 incurred, and then it says most of the costs were related to  
17 the *Trump v. Vance* case.

18 So I just want to point out that it is not accurate to  
19 say that this money was spent, all this money was spent on the  
20 prosecution of Mr. Weisselberg. As well, there's no dispute  
21 here that this has been an ongoing investigation for years, and  
22 if they spent \$5, if they spent \$5 million, Congress has the  
23 power of the purse. Congress has the right to investigate  
24 whether or not expenditures are appropriate, and in particular,  
25 here Congress has the right to try to investigate, given

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1 everything that's going on with respect to investigations, is  
2 it appropriate going forward for federal funds to be used on  
3 the investigations and prosecutions of current and former  
4 Presidents and that this -- the nature of this investigation is  
5 relevant to that inquiry.

6 THE COURT: But the testimony that you seek has to  
7 relate to that --

8 MR. BERRY: Yes.

9 THE COURT: -- let's assume it is a valid legislative  
10 purpose, does it not?

11 MR. BERRY: Absolutely.

12 THE COURT: How does Mr. Pomerantz's testimony relate  
13 in any way to these stated legislative purposes?

14 MR. BERRY: As someone who was intimately involved in  
15 this investigation, he can give us information in terms of  
16 whether or not this is the type of investigation upon which  
17 federal funds should be spent. And it doesn't matter how much  
18 money we're talking about; Congress has the power of the purse.

19 And with that, your Honor, that's all I have here to  
20 submit.

21 THE COURT: All right. Then I thank everybody very  
22 much for spirited oral arguments and really excellent briefing.  
23 I will get a decision published as promptly as I can.

24 We'll stand adjourned then, everyone. Thank you.

25 (Adjourned)